MCLAREN SAKSAMA (MALAYSIA) SDN BHD A

v.

HONG LEONG BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ROSILAH YOP JC
[SUIT NO: S-22-372-2008]
27 FEBRUARY 2013

BANKING: *Banker and customer - Forgery - Forgery of company* C
cheques - Bank honoured forged cheques - Burden and standard of proof - Failure to check irregular transactions of cheques - Failure to notify bank of forged cheques - Whether bank protected - Bills of Exchange Act 1949, s. 73A - Civil Law Act 1956, s. 12

EVIDENCE: *Adverse inference - Failure to call witness - Failure to call* D
material witness - Whether adverse inference could be drawn - Evidence Act 1950, s. 114(g)

EVIDENCE: *Expert evidence - Handwriting - Expert opinion - Nature* E
of opinion - Whether different signatures amounted to forgery - Whether safe to rely on expert opinion without cogent grounds

The plaintiff was a customer and a current account holder with the defendant. The plaintiff's action was that the defendant had made wrongful payment of 105 cheques from the plaintiff's current F
account to third parties which resulted in losses to the plaintiff. The plaintiff claimed that the signatures of Leong Yeek Fook ('SP2') on the said cheques were forged. The defendants, however, contended that the plaintiff failed to prove that SP2's signature on the 105 cheques were forged. In the alternative, even G
if the forgery was proved, the defendant was entitled to a complete defence under s. 73A of the Bills of Exchange Act 1949 as the plaintiff had not taken reasonable steps to notify the defendant that the signatures were forged or to a partial defence under s. 12 of the Civil Law Act 1956 as the plaintiff's directors H
had failed to take reasonable steps to detect irregular transactions involving cheques. The issues that arose were, *inter alia*: (i) in relation to the burden and standard of proof to establish forgery; (ii) whether the plaintiff was bound by the rules governing the opening of a current account; (iii) whether adverse inference could I
be drawn on the plaintiff's failure to call a material witness, one

A Suhaila; and (iv) whether it was safe for the court to rely on the opinion of the handwriting expert without cogent grounds that supported the findings.

Held (dismissing plaintiff's claim with costs):

B **(1)** It was settled law that forgery had to be established on the balance of probabilities. The burden of proof to establish forgery rested upon the plaintiff throughout the trial. The evidential burden of proof shifts to the defendant once the plaintiff discharges his burden of proof. If the plaintiff failed to C discharge the original burden of proof, then the defendant need not adduce any evidence. (paras 16, 17 & 18)

(2) The plaintiff had knowledge and was bound by the rules governing the opening of a current account as the said rules D were provided to the plaintiff. (para 24)

(3) SP2 and SP5's testimony that Suhaila had admitted to them that she had forged SP2's signature was not admissible as the evidence was hearsay evidence. Further, Suhaila being a E material witness was not called to testify. Hence, the court was prompted to draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the plaintiff. (paras 36 & 37)

(4) Signatures signed differently did not mean that it was evidence F of forgery. No signature could be exactly the same even though it was written by the same person. The evidence by a handwriting expert could never be conclusive because it was only an opinion evidence. The plaintiff's failure to send the specimen signature card which contained SP2's signature for G analysis was fatal to the plaintiff's case as the expert could not form his opinion on the 79 cheques without comparing the signature of SP2's on the specimen card. It was not safe for the court to rely on handwriting expert report if there was no concrete footing to support the findings made. The expert H opinion was rendered as a bare expression of opinion which could not carry any weight. (paras 33, 39, 40 & 51)

Case(s) referred to:

Chang Wei Lu, Personal Representative of the Estate of Chang Guan Nyai (Deceased) v. Chang Lee Mooi [1996] 2 BLJ 227 HC ***(refd)***

I *Crawford v. Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40* ***(refd)***

CS Petroleum (M) Sdn Bhd v. Public Bank Berhad & Another Cases [2011] 1 LNS 1349 HC ***(refd)***

Doe D Devine v. Wilson [1855] 14 ER 581 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarlous George Fernandez & Anor & Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***
Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2010] 6 CLJ 530 CA ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***
Leong Hoong Khie v. PP & Another Case [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 FC ***(refd)***
Mawaz Khan v. The Queen [1967] 1 AC 454 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Nina Kung v. Wang Din Shin [2005] HKCFA 54 ***(refd)***
Ratten v. The Queen [1972] AC 378 ***(refd)***
Rejfek v. McElroy [1965] 112 CLR 517 HC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd [1988] 1 LNS 78 HC ***(refd)***
Tay Thong Chew & Anor v. Abu Rahman Hj Ahmad [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389 FC ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 24, 73A
Civil Law Act 1956, s. 12
Evidence Act 1950, ss. 51, 101(1), 102, 114(g)

For the plaintiff - N Krishna Moorthy (Farrah Dina Alodin with him); M/s Fauzi, Ngah & Neasa
For the defendant - Andrew Chiew (CB Loh & Sara Ann Chay Sue May with him); M/s Lee Hishammuddin Allen & Gledhill

Reported by Sandra Gabriel

JUDGMENT

Rosilah Yop JC:

The Plaintiff's Case

[1] The plaintiff was a customer of the defendant and having the current account No: 00100063923. The authorised cheque signatories of the said plaintiff's current account are:

– Wong Kem Chen;

– Lum Siew Wai; and

– Leong Yee Fook.

[2] Anyone of these signatories can endorse cheques for RM5,000 or less. Cheques exceeding RM5,000 required joint endorsement by any two of the above authorised signatories.

[3] Between July 2000 and September 2002, the defendant paid various cash cheques amounting to RM465,040 purporting to be drawn by the plaintiff payable to bearer and debited the plaintiff's account with the amount thereof.

[4] The particulars of the 105 cheques are pleaded in para. 6 of the statement of claim.

[5] The plaintiff did not draw the said cheque or authorise the drawing of the said cheques.

[6] The signature on each of the said cheque was not that of the authorised signatories. The signatures were forged. The defendant had paid out the said cheques to the third party. In the premise, plaintiff had suffered losses.

The Defendant's Case

[7] The defendant denies that the signatures of Leong Yee Fook were forged. It is the defendant's case that Leong Yee Fook signed the cheques.

[8] The plaintiff did not notify the defendant that the signatures of the cheques, which were cleared between July 2000 and September 2002, were purportedly forged notwithstanding that the plaintiff knew and was obliged to do so. The plaintiff protested only for the first time that the signatures of the cheques were forged on 8 August 2003.

[9] In all the circumstances, the plaintiff is precluded by the rules, which form the terms and conditions for the current account, from contending the cheques were honored in breach of mandate, in the alternative, the plaintiff is *estopped* by conduct from doing so.

[10] Further and in the alternative, the defendant contends that the plaintiff negligently contributed to the alleged forged signatures on the cheques. The defendant contends that:

- the plaintiff's directors failed to check or take responsible steps to check the plaintiff's statement of accounts on monthly basis and hence, failed to detect the alleged irregular transactions involving the cheques;
- the plaintiff's directors also failed to undertake regular review of its cheques and conduct regular reconciliation of cheques paid with the plaintiff's monthly statement of account;
- the plaintiff's directors failed to ensure that the cheques books were kept under the custody, control and/or possession of plaintiff's duly authorised signatories or persons authorised by the plaintiff to confirm the transactions of the cheques drawn against the current account; and
- the plaintiff's directors failed to exercise reasonable care in supervising the plaintiff's employees who during the material times had custody, control and possession of the plaintiff's cheques book.

The defendant had acted in good faith in clearing the cheques.

[11] Therefore the defendant is entitled to either a complete statutory defence under s. 73A of the Bills of Exchange Act 1949 or a partial defence under s. 12, Civil Law Act 1956.

Issues To Be Tried

[12] The agreed issues to be tried were stated in document marked as 'R' and reproduced as follows:

1. Sama ada plaintif adalah tertakluk kepada "kaedah-kaedah akaun semasa" dan/atau "kaedah-kaedah akaun semasa terpinda" dalam pengendalian dan pengurusn akaun plaintif di defendan.

2. Sama ada tandatangan pengisu cek dalam 105 cek-cek yang merupakan perkara subjek tuntutan ("cek-cek") ini telah dipalsukan.

3. Sama ada plaintif diestop daripada mendakwa cek-cek telah dipalsukan dan defendan berhak untuk bergantung kepada s. 24, Akta Pertukaran Bil 1949.

4. Sama ada defendan berhak kepada pembelaan di bawah s. 73A, Akta Pertukaran Bil 1949.

5. Sama ada plaintif telah melakukan cuai sumbangan dalam pengeluaran cek-cek dan kerugian defendan seharusnya dikurangkan sebahagian atau secara keseluruhan di bawah s. 12, Akta Undang-Undang Sivil 1956.

Analysis Of Evidence And Findings

[13] The plaintiff action based on conversion against the defendant for wrongful making payment of 105 cheques against the plaintiff's current account. The plaintiff claims that the signatures of Leong Yee Fook (SP2) were forged.

[14] The defendant contents that the plaintiff failed to prove that SP2's signatures on the 105 cheques were forged. Even if the forgery is proven, the defendant is entitled to a complete defence under s. 73A, Bills of Exchange Act 1949 and in the s. 12, Civil Law Act 1956.

Law On Forgery

[15] In this case the onus is upon the plaintiff to establish the alleged forgery. The standard of proof of forgery in civil proceedings falls within the general rule of the common law that in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities – see *Rejfek v. McElroy* [1965] 112 CLR 517 HC Australia.

[16] It is now settled law that forgery need only be established on a balance of probabilities – see *Doe D Devine v. Wilson* [1855] 14 ER 581, 592 (PC); *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182 (SC); *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd* [1988] 1 LNS 78; [1988] 3 MLJ 218).

[17] In the light of the above mentioned the burden of proof to establish forgery rests upon the plaintiff – s. 101(1) Evidence Act 1950. The burden of proof on the plaintiff is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence.

[18] The burden of proof lies on the plaintiff throughout the trial. The evidential burden of proof is only shifted to the defendant once that the plaintiff has discharged his burden of proof. If the plaintiff fails to discharge the original burden of proof, then the defendant need not adduce any evidence.

[19] Therefore, it is the plaintiff who must establish his case. If he fails to do so, it will not for the plaintiff to say that the defendant has not established his defence – see *Selvadury v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 (CA); s. 102 Evidence Act 1950.

Issue 1

[20] The plaintiff contends that there is no evidence to show that exh. D13 ie, the rules governing the opening of current account, was given to the plaintiff and thus, the legal effect of it, the plaintiff cannot be bound by the said rules.

[21] The plaintiff submitted that during the cross-examination of DW1, DW1 could not confirm whether the said rules were actually given to the plaintiff. Further, during the cross-examination DW1 confirmed that he was not working with the defendant after February 2001 and had no knowledge of the rules being given to the plaintiff. As such plaintiff was unaware of such rules.

[22] The defendant's contention is that the plaintiff is governed by the said rules and the rules were given to the plaintiff.

[23] Through the account opening form (bundle C p. 94) clearly shows that the plaintiff acknowledged receipt exh. D13. PW2 testified and confirmed that the plaintiff's finance department would have D13.

[24] From the evidence, from both sides, I conclude that the plaintiff have knowledge and did receive D13 and D13 binds the plaintiff.

A **Issue 2**

[25] The plaintiff had adduced the following evidence to prove forgery:

B (i) SP2 confirmed that the signatures on the 105 cheques were not his;

(ii) Suhaila admitted to SP2 and SP5 that she had forged the signatures of SP2; and

C (iii) handwriting expert opinion by SP6.

Evidence Of SP2

[26] Was there any evidence of forgery?

D **[27]** The plaintiff claimed the signatures of SP2 on the 105 cheques were forged. SP2 is one of the authorised signatories of the plaintiff's account and also the director of the plaintiff.

[28] SP2 testified that he had only seen 79 cheques. SP2 never see the remaining 26 cheques (annexure A). This was confirmed E by the evidence of SP2 in cross-examination that he assumed the remaining 26 cheques were forged.

[29] Out of these 26 cheques, 12 cheques were sent by the defendant for the expert opinion. The plaintiff did not even ask F SP2 to identify as to whether his signatures on these 12 cheques were forged.

[30] SP2 claimed that his signatures on the 79 cheques at pp. 13-91, bundle C were forged.

G **[31]** SP1 in cross-examination agrees that the signatures by the same person cannot be exactly the same.

[32] In this regard, it is an accepted fact that a signature signed differently does not necessary mean that it is evidence of forgery. H In *Nina Kung v. Wang Din Shin* [2005] HKCFA 54, Chan PJ said,

> ... No two signatures written by the same person can be exactly the same. There are bound to be difference ...

I **[33]** I agree that no signature can be exactly the same even though written by the same person.

[34] The defendant produced undisputed cheques, D16 (1) to D16 (17). SP2 confirmed that his signatures on these undisputed cheque were similar to those 79 cheques which he alleged forgery. These cheques were also cleared from June 2000 to December 2001 (the same period when the 105 cheques were cleared). There is no iota of evidence that the plaintiff ever disputed these cheques. These cheques are not part of the plaintiff's claim. SP2 did not give any satisfactory explanation to explain the contradiction.

[35] It is obvious that SP2's evidence that the signatures on the 79 cheques are forged is obviously inconsistent with SP2's evidence on the undisputed cheque ie, D16 (1) to D16 (17).

Admission By Suhaila

[36] During the trial, SP2 and SP5 testified that Suhaila admitted to them that she had allegedly forged SP2's signatures. I take note that the Suhaila was not called as a witness at all during the trial. Hence, the evidence given by SP2 and SP5 is not admissible. It is hearsay evidence – see *Leong Hoong Khie v. PP & Another Case* [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 Federal Court, *Subramaniam v. PP* [1956] 1 LNS 115, Privy Council in *Mawaz Khan v. The Queen* [1967] 1 AC 454 and *Ratten v. The Queen* [1972] AC 378.

[37] Suhaila is an important witness to the plaintiff's case. She was said to have admitted that she had forged the signatures of SP2. Suhaila should be called to give evidence but she was not called to give evidence in court. No credible reason has been given for her non-attendance at trial such as to allow for an adverse inference to be drawn against the plaintiff under s. 114(g) of the Evidence Act 1950. Based on this statutory presumption, her evidence, if called, could only be unfavourable to the plaintiff. Further, the failure to call Suhaila in these circumstances amounts to a conscious withholding or suppression of evidence which has denied the defendant the opportunity to cross-examine her on the alleged admission. Suhaila is, in these circumstances, a very material witness whose evidence will be crucial in unfolding the narrative of the case – see *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 and *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492. The burden is on the plaintiff to call Suhaila to lead evidence on the allegation of admission.

[38] It is well settled that in civil proceedings the court may draw adverse inferences from a plaintiff's decision not to give or call evidence as to matters within the knowledge of Suhaila – refer to Privy Council in the case of *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40 (see also cases *Tay Thong Chew & Anor v. Abu Rahman Hj Ahmad* [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389; *Eastern & Oriental Hotel [1951] Sdn. Bhd. v. Ellarlous George Fernandez & Anor. & Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; and *Guthrie Sdn Bhd. v. Trans Malaysian Leasing Corp Bhd.* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155.

Hence the plaintiff's case under this issue is rejected by this court.

Plaintiff's Handwriting Expert Opinion (SP6)

[39] The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist the court to form its own opinion – refer to the Federal Court case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153.

[40] The law on handwriting expert opinion, it is settled law that the bare opinion of an expert, without cogent grounds to support his findings, is of no value or use as evidence.

[41] See s. 51 of Evidence Act 1950:

> **51. Grounds of opinion when relevant**
>
> Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant.

[42] The Supreme Court clearly upheld this principle in case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 at pp. 36-37:

> ... In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal.

[43] On becoming a bare expression of opinion according to Abdul Malik Ishak JCA in *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484.

> The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (*Sim Ah Song & Anor v. Rex* [1951] 1 LNS 83; [1951] MLJ 150; *Lai Yong Koon v. Public Prosecutor* [1962] 1 LNS 74; [1962] MLJ 327; and *Public Prosecutor v. Yiau Swee Tung* [1998] 1 LNS 355; [1999] 3 MLJ 353)

[44] SP6 was called to tender his signature verification report dated 24 February 2010 on SP2's signatures on the 79 cheques.

[45] The basis of SP6's opinion was not stated during examination in chief. During cross-examination, SP6 confirmed that the basis in which he arrived at his opinion is not set out in his report.

[46] SP6 did not show in his report, the process by which he came to his conclusion. No reason was provided by SP6 to substantiate his findings.

[47] In addition to the above, it is the evidence of SP6 that he did not examine the specimen signature card that contained SP2's signature.

[48] In *Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 530, it was held that:

> The failure of the expert to examine the specimen signature card would have a disastrous effect on the party seeking to rely on the expert report.

[49] It is the evidence of the defendant's witnesses that they relied on the signature of SP2 on the specimen card to approve the payment of the 105 cheques.

[50] Plaintiff did not send the specimen signature card which contained SP2's signature to SP6 for analysis. This is fatal to the plaintiff's case since SP6 cannot form his opinion on the signatures on these 79 cheques to be compared with the signature of SP2 on the specimen card.

[51] I find that it is essential for the specimen signature by SP2 to be analysed and compared with the questioned signatures before coming to his conclusions to be properly discovered and tendered as evidence for the consideration of the court. Simply put, it is not safe for the court to rely on handwriting expert

report if there is no concrete footing to support the finding made. Without them based on the cited authorities, SP6's opinion is rendered as a bare expression of opinion without more, and as such, cannot be given any weight.

[52] The plaintiff bears the burden of proving forgery. It is also trite law that until the plaintiff has done so, there is no onus on the defendant to disprove the allegation – see *Chang Wei Lu, Personal Representative of the Estate of Chang Guan Nyai (Deceased) v. Chang Lee Mooi* [1996] 2 BLJ 227, *CS Petroleum (M) Sdn Bhd v. Public Bank Berhad & Another Cases* [2011] 1 LNS 1349.

[53] Based on the above, the plaintiff failed to prove on a balance of probabilities that SP2's signatures on 105 cheques were forged.

Issues 3, 4 And 5

[54] The plaintiff failed to prove that all the signatures on the 105 cheques were forged. Hence, issues 3, 4 and 5 here are irrelevant. There was no onus on the defendant to disprove that all signatures on 105 cheques belongs to SP2.

[55] Accordingly, in light of the facts that the court had found the plaintiff have failed to prove that signatures of SP2 were forged, that the plaintiff have failed to make out their case against the defendant on the balance of probabilities. The plaintiff's case against the defendant is thus dismissed with costs. Costs of RM30,000 are to be paid by plaintiff to the defendant.